LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 28 1967
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO, and PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

KAPELSOHN, LERNER, LEUCHTER & REITMAN,
Attorneys for Respondent, Local 400 International Union of Electrical, Radio & Machine Workers of America, AFL-CIO,
24 Commerce Street,
Newark, New Jersey, 07102.

SIDNEY REITMAN,
Of Counsel.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
CONCLUSION	11

Cases Cited

Bilton Insulation Co. v. NLRB, 297 F. 2d 141 (C. A. 4, 1961)	10
Boire v. Greyhound Corporation, 376 U. S. 473 (1964)	9
Federal Telecommunications Laboratories, Inc., 63 NLRB 947 (1945)	5
Federal Telecommunications Laboratories, Inc., 92 NLRB 1395 (1951)	5
Joy Silk Mills, Inc. v. NLRB, 185 F. 2d 732 (C. A. D. C. 1950), cert. den., 341 U. S. 914	10
Leedom v. Kyne, 358 U. S. 184 (1958)	4, 6-11
NLRB v. Henry Heide, 219 F. 2d 46 (C. A. 2, 1955), cert. den., 349 U. S. 952	10
NLRB v. Stow Mfg. Co., 217 F. 2d 900 (C. A. 2, 1954)	10
Railway Clerks v. Employers Ass'n, 380 U. S. 650 (1965)	9
Ray Brooks v. NLRB, 348 U. S. 96 (1954)	10
Vincent Drugs, 144 NLRB 1247 (1963)	7-9
Westinghouse Electric Corp. v. NLRB, 236 F. 2d 939 (C. A. 3, 1956)	7, 8

PAGE

Statute Cited

National Labor Relations Act:

Sec. 8(a)(1) 4
Sec. 8(a)(5) 2, 4
Sec. 9 7
Sec. 9(a) 6
Sec. 9(b)(1) 4, 6, 7, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Maryland corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, AFL-CIO, and PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondent, Local 400 International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, hereinafter referred to as "Local 400" or "Union", prays that

the application of Petitioner, International Telephone and Telegraph Corporation, hereinafter referred to as the "Company," for the issuance of a Writ of Certiorari to reverse the Decree of the United States Court of Appeals for the Third Circuit entered on August 31, 1967, affirming and enforcing the Order issued by the National Labor Relations Board on June 29, 1966, be denied.

Counter-Statement of Question Presented

Was the petitioner's withdrawal of recognition from and refusal to bargain with the respondent Local 400 as bargaining representative of the professional employees in the Engineer-Technician unit, after the commission of earlier unfair labor practices, and during the course of a lawful strike, a violation of section 8(a)(5) of the National Labor Relations Act?

Counter-Statement of the Case

Local 400 is and has been since 1951 the representative of employees of the Company's Nutley, New Jersey research facilities in three separate bargaining units, commonly known as the "Engineer-Technician" unit, "Clerical-Drafting" unit, and "Shop-Maintenance" unit (P108a; R6b).* These units were originally established in 1945 by the predecessors of both Local 400 and the Company (P421a; 63NRLB947). Following the NLRB proceedings the units were modified by consent of the parties to conform to the aforementioned designations and the modifications so reflected in collective agreements which were effective until Local 400 became the designated bargaining agent. Said basic units were continued thereafter by Local 400 (P108a; P109a).

---

* Reference to the Company's appendix filed below will be designated "P—a". Reference to the Board's appendix filed below will be designated "R—b".

In 1951 the unit structure created by the parties was continued by the Board in a representation proceeding which resulted in recognition of Local 400. The Company had sought a separate vote for professionals and proposed exclusion of technicians. The Union contended technicians were professionals. The Board made no determination on this issue, and pursuant to Board principles then applicable directed an election in which the technicians voted with those clearly conceded to be professionals (P108a; 92NLRB1395).

Since 1951 ITT and Local 400 have been parties to collective agreements for the years 1951-1952, 1952-1954, 1954-1956, 1956-1959, 1959-1961, and 1961-1964 (P109a; R4b to R8b, G. C. Exhs. 2c, 2d, 3c, 4, 5 and 6). In virtually each of these years additional alterations were effected in the composition of the bargaining units. The original 1945 units were altered, extended and modified by the various collective agreements, NLRB proceedings, arbitration awards and interim agreements between the parties. The Engineer-Technician unit in the last contract was more extensive and different than the units as originally constituted (P112a; R61b, G. C. Exhs. 7 and 8; P324a to P332a, G. C. Exh. 9b; R81b to R84b, G. C. Exh. 13; R91b, G. C. Exh. 22; R94b, G. C. Exh. 23).

The 1961-1964 contract was to expire by its terms on September 9 (R18b; P109a). On July 20, 1964, new contract negotiations commenced between the company and Local 400 (P43a; P65a). The parties were unable to reach agreement by the expiration date and on September 9, 1964, a strike commenced (R71b; P44a). Negotiations with respect to each of the units continued after commencement of the strike and until October 8, 1964, when the company withdrew recognition from Local 400 as the bargaining agent for the professional employees in the Engineer-

Technician unit (P366a, G. C. Exh. 32). Bargaining continued in the other units, though under the cloud of bad faith as more specifically set forth in the Board's order (P44a; P109a).

Prior and subsequent to the aforementioned strike several unfair labor practice charges were filed alleging various actions of the company constituted unlawful interference and a refusal to bargain in violation of Section 8(a)(1) and (5) of the Act (P3a to P6a, G. C. Exhs. 1A, E, H). A complaint was issued, a hearing held before a Trial Examiner, and a Board decision rendered which found, *inter alia,* that the Company had violated Section 8(a)(5) of the Act in withdrawing recognition of the union and refusing to bargain in the Engineer-Technician unit, rejecting the company's contention that said unit was inappropriate under *Leedom* v. *Kyne,* 358 U. S. 184 (1958). Said decision was affirmed by the Court of Appeals.

Reasons for Denying the Writ

1. The withdrawal of recognition and refusal to bargain in the Engineer-Technician unit was unlawful and in violation of Section 8(a)(5) of the National Labor Relations Act. Said conclusion of the Board and the Court of Appeals is not in conflict with *Leedom* v. *Kyne, supra.* Petitioner's contention that *Leedom* v. *Kyne,* as it interprets Section 9(b)(1) of the Act, precludes the Board from declaring under any circumstances, and in any proceeding, that a "mixed unit" is appropriate for collective bargaining, misconstrues the statute, ignores the basic principle in *Leedom* v. *Kyne,* and would extend a broader application to the decision than contemplated by the Court.

The company's contentions to the contrary notwithstanding, the collective bargaining unit in issue was not created in the 1951 Board decision, but rather had its genesis

in the Board's opinion in the 1945 decision, *Federal Telecommunications Laboratories, Inc.*, 63 NLRB 947 (1945), and was modified, altered and extended by the consent of the parties thereafter. This is demonstrated by a review of the bargaining history.

In 1945 the Board directed an election in three separate units, to wit, an *engineering unit*, thereafter referred to by the parties as the "Engineer-Technician" unit, a *clerical unit*, thereafter referred to by the parties as the "Clerical-Drafting" unit, and a *shop unit* which thereafter became known as the "Shop-Maintenance" unit. Said election resulted in a certification only for the shop employees. The "Engineering" unit included engineers' assistants, junior engineers, laboratory assistants, senior laboratory technicians, and senior engineers.

In 1946 a consent election was conducted in the *engineering unit* which resulted in a certification. In the spring of 1947 the company and the union effected modifications in the *engineering unit* when they created the classifications "Technician A, B & C" and eliminated the titles "Laboratory Technicians" and "Engineers' Assistants" (P107a; P425a; P427a; P428a).

In 1948 the parties executed separate 2-year contracts covering each of the groups hereinbefore referred to which were then known and designated as the "Engineer-Technician" unit, "Clerical-Drafting" unit, and the "Shop-Maintenance" unit.

Upon expiration of the 1948-1950 contracts representation petitions were filed by Local 400. These units created by the parties were affirmed, in essence, in the Board's decision in *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395, 1397 (1951).

Local 400 was certified in the election conducted under the 1951 decision. The "Engineer-Technician" unit con-

tinued, with modifications, alterations, and extensions as thereafter reflected in the six collective agreements negotiated in the years 1951 through 1964 (G. C. Exhs. 2c, 3c, 4, 5, 6, 2d). Changes were made in this unit by the consent of the parties through negotiated agreements, arbitration awards, and grievance settlements (G. C. Exhs. 7, 9(a) and (b), 22, 23, 24(a)(b)(c), 25, and 40; R24b to R31b).

Petitioner conceded that it recognized and bargained with the union in the Engineer-Technician unit and that no issue had been raised with respect thereto prior to October 8, 1964, when a decertification petition was filed on behalf of the professions (R6b; R62b).

The National Labor Relations Act merely precludes the Board from establishing a unit of professionals and non-professionals in a 9(a) proceeding unless the professionals have been afforded the right of self-determination provided in 9(b)(1). Neither the statute or *Kyne* PROHIBIT a mixed unit as inappropriate *per se*. *Kyne* must be read and applied in the context of its factual presentation.

In *Kyne* the Board conceded it had combined professionals with non-professionals in an original petition. Immediately thereafter, and before any bargaining commenced, the Board's determination was attacked as *contra* to 9(b)(1).

In the instant case the bargaining history reflects that the unit was in fact *created* by the parties as they modified the 1945 and 1951 Board decisions. Numerous collective agreements were negotiated between the parties. Substantial modifications were effected in the unit. Although many opportunities were available to test this unit question including the time of the 1959 and 1961 contract reopening periods—both following *Leedom* v. *Kyne*—no

steps were taken to do so. After 14 years of bargaining in this unit the question is now raised for the first time in the face of other unfair labor practices by respondent which would preclude an opportunity for a free and uncoerced election.

The company failed to offer any evidence as to the composition of the unit, nor did it offer any evidence to contradict the proof that the unit had been created by the parties and substantially altered by them since the 1945 and 1951 Board decisions. The company's sole claim is that when the professionals were denied an opportunity for self-determination in 1951 such conduct was unlawful, the unit is therefore void *ab initio,* that *Leedom* v. *Kyne, supra,* compels a finding that the "mixed" unit is inappropriate, and therefore the company did not violate 8(a)-(5) when it withdrew recognition of the Union during the 1964 contract negotiations and strike.

In *Vincent Drugs,* 144 NLRB 1247 (1963), the issue presented was whether the contract unit therein, which was a mixed unit, was an appropriate bargaining unit. It was argued that the Board under no circumstances could find a mixed unit to be appropriate unless the professionals at some time voted for inclusion as provided in 9(b)(1). This thesis was rejected upon the ground that 9(b)(1) was construed as a limitation upon the Board's authority in a section 9 proceeding, and did not preclude a voluntarily established mixed unit.

In *Westinghouse Electric Corp.* v. *NLRB,* 236 F. 2d 939 (C. A. 3, 1956), the issue related to the voluntary inclusion of professionals with nonprofessionals and the effect of 9(b)(1). At p. 943 the court commented:

> ". . . The obvious effect of the proviso is merely a limitation on the Board's power to *create* mixed units." (Emphasis supplied.)

The court further stated, at 944:

> "... the long association of these engineers with the (nonprofessional) salaried unit, their existing contract with the IUE, and the fact that they may at a proper time in the future determine whether they will be included in the (professional) unit, leads us to accept their present exclusion as justified."

It was argued in *Vincent Drug*, as in the instant case, that *Leedom* v. *Kyne* compelled the Board to find that the contract unit was inappropriate. The Board distinguished *Kyne* and said:

> "... the *Kyne* case was not concerned with the validity of an existing contract covering a unit of both professional and nonprofessionals that had been established by the parties, based on an established collective bargaining history which preceded the making of the contract. The precise issue presented in the *Kyne* case was whether such a combined unit could be established initially by Board action in a representation proceeding without first affording the professional employes a self-determination election to authorize their inclusion in such a unit. We therefore find the cited case distinguishable and inapposite.
>
> "In all the circumstances of this case, and considering particularly the long collective bargaining history between the Employer and the Union in contracting on the basis of the combined unit here involved—a history which began some 6 years before the contract in issue was executed—we find no sufficient basis for holding that the contract unit was inappropriate. Nor do we interpret Section 9(b)(1) as requiring us in this proceeding to hold otherwise."

The employer's construction of *Leedom* v. *Kyne* would expand the rule of the case beyond its intent. On two subsequent occasions the Supreme Court has indicated the "extraordinary circumstances" existing in *Leedom* v. *Kyne* and reemphasized the "narrow limits" within which it should be applied. *Boire* v. *Greyhound Corporation*, 376 U. S. 473 (1964) and *Railway Clerks* v. *Employers Ass'n*, 380 U. S. 650 (1965).

The Board and the Court of Appeals quite appropriately concluded that the employer should be estopped from denying the appropriateness of the contract unit in light of the bargaining history regarding the composition of the unit; the failure of the employer to question the unit structure during the years of bargaining; and the withdrawal of recognition during negotiations, after commencement of the 1964 strike and in the face of other unfair labor practices. Both the Board and the Court concluded that the unit in issue was a consensual unit and not a unit "created" by the Board. To conclude otherwise in the instant case would permit one to terminate a relationship when it suits the convenience or purpose of the moment and would thereby permit the manipulation of the Board to defeat the basic objectives of the statute.

Accordingly, it is respectfully submitted that the determination that the historically established contract unit was not inappropriate, was in fact a consensual unit, and adherence to the *Vincent Drug* principles was sound.

2. The Company conceded that its withdrawal of recognition was not predicated upon any good faith doubt as to the union's majority status as bargaining agent in the mixed unit. In light of the recognition extended to the union over the years, there is a presumption of continuance of majority which petitioner did not dispute or seek to rebut. The petitioner may not now assert a doubt it previously conceded did not exist.

No question was raised as to the Union's majority prior to the withdrawal of recognition. To the contrary the record discloses that it was conceded that the Union did represent a majority when the contract negotiations commenced and during the strike up to October 8, 1964, the date of withdrawal of recognition (P110a; P56a, n. 21; P314a to P315a; P255a to P258a). The company's sole basis for its refusal to bargain was predicated upon its erroneous construction and interpretation of *Leedom* v. *Kyne, supra*.

In the face of a continuing bargaining relationship, where an employer has doubts as to his duty to bargain he must petition the Board for relief, while continuing to bargain until the Board has given some indication that the claim has merit. The employer may not justify self-help but is required to follow the Congressional device to determine the question. *Ray Brooks* v. *NLRB*, 348 U. S. 96 (1954). However, good faith doubt as to the majority status of the Union can't be raised in the context of illegal anti-Union activity or other conduct of the employer designed to undermine the Union. *NLRB* v. *Henry Heide*, 219 F. 2d 46 (C. A. 2, 1955), cert. den. 349 U. S. 952.

As noted, it is significant that no evidence was offered by the employer in the Board hearing to refute the Union's majority status as of the withdrawal of recognition. To the contrary, such evidence as was received with respect to majority on October 8, 1964 clearly established proof of majority. In any event, in light of the employer's prior unfair labor practices, any subsequent claimed loss of majority would be rejected and disregarded. *Joy Silk Mills, Inc.* v. *NLRB*, 185 F. 2d 732 (C. A. D. C. 1950), cert. den. 341 U. S. 914; *NLRB* v. *Stow Mfg. Co.*, 217 F. 2d 900 (C. A. 2, 1954); *Bilton Insulation Co.* v. *NLRB*, 297 F. 2d 141 (C. A. 4, 1961).

The attack upon the Union's majority status as bargaining representative is a smoke screen raised after the close

of the NLRB hearing, and after admission of majority status, in an effort to becloud the real issue, to wit, does *Leedom* v. *Kyne* provide legal justification for the refusal to continue to bargain. For the reasons heretofore set forth, we submit it does not.

The issue in the case at bar is whether or not the contract unit was appropriate for collective bargaining. The issue is not whether the Board should give professionals an opportunity to have a self determination election, as in *Leedom* v. *Kyne*. Neither is the validity of the 1951 certification in issue. The contract unit is the product of the parties and is not inherently inappropriate or invalid. To the contrary, Section 9(b)(1) specifically contemplates that such a contract unit may be appropriate.

While a petition for self determination may at some future appropriate time alter this contract unit, the employer may not engage in a course of conduct clearly violative of the statute and then seek to exculpate itself from fulfillment of its statutory duty by rejecting as inappropriate the contract unit it helped to create. To conclude otherwise would make a mockery of statutory obligations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KAPELSOHN, LERNER, LEUCHTER & REITMAN,
Attorneys for Respondent Local 400 International Union of Electrical, Radio & Machine Workers of America, AFL-CIO.

SIDNEY REITMAN,
Of Counsel.